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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-48

CECIL D. ANDRUS, Secretary of the Interior, ET AL.,
Petitioners,

VERSUS

GLOVER CONSTRUCTION COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	1
STATUTORY PROVISIONS INVOLVED	2
THE PARTIES	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. Road construction projects are not supplies or products available in the open market within the meaning of 25 U.S.C. § 47	8
II. The BIA's recent administrative construction that roadway construction is exempt from competitive bidding is entitled to no weight	18
III. The special relationship between the Federal Government and the Indians does not compel a strained interpretation of 25 U.S.C. § 47	22
IV. 41 U.S.C. Section 5 and 41 U.S.C. Sections 252 and 253 require the BIA to advertise and obtain competitive bids on roadway construction projects	25
CONCLUSION	29

TABLE OF AUTHORITIES

Cases PAGE

Bowers v. West Virginia Pulp & P. Co., 297 Fed. 225 (2d Cir. 1924) 21

Citizens Band of Pottawatomie Indians of Oklahoma v. United States, 391 F.2d 614 (Ct. Cl. 1967), cert. den. 389 U.S. 1048 (1968) 19-20

Crescent Express Lines v. United States, 320 U.S. 401, 88 L.Ed. 127 (1943) 16

DeCoteau v. District County Court, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975) 22

Hollander v. Magnoe, 149 U.S. 586, 13 S.Ct. 932, 3 L. Ed. 860 (1893) 15

McClanahan v. Arizona Tax Commission, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) 22

Morton v. Mancari, 417 U.S. 535, 94 S.Ct. 2474, 41 L. Ed.2d 290 (1974) 28

Oliphant v. Suquamash Indian Tribe, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978) 23

Sanborn v. Commissioner of Internal Revenue, 88 F. 2d 137 (8th Cir. 1937), cert. den. 301 U.S. 700 17

Stewart v. Kahn, 11 Wall. 493, 20 L.Ed. 176 (1871) 9-10, 12-13

Udal v. Tallman, 380 U.S. 1 (1965) 19

United States v. Dickson, et al., 15 Pet. 141, 10 L.Ed. 689 (1841) 15

United States v. Manzi, 16 F.2d 884 (1st Cir. 1926) 19

United States v. Missouri Pacific R.R., 278 U.S. 269 (1929) 19

United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 73 S.Ct. 227, 97 L.Ed. 260 (1952) 18

AUTHORITIES CONTINUED

Codes and Statutes PAGE

25 U.S.C. § 47 ..... 2, 3, 4, 5, 6, 7, 8, 14, 19, 26, 27, 28, 29

41 U.S.C. § 5 ..... 7, 9, 25, 26

41 U.S.C. § 252 ..... 5, 7, 25, 26, 28

41 U.S.C. § 252(c) 4, 26, 27, 28

41 U.S.C. § 252(c)(15) 4, 27

41 U.S.C. § 252(e) 28

41 U.S.C. § 252(e)(B) 4, 26, 27

41 U.S.C. § 253 ..... 3, 5, 7, 25, 28

47 U.S.C. § 25 6

Act of June 25, 1910, ch. 431, § 23 (26 Stat. 861) 6, 8, 9

Miscellaneous

20 BIAM Bulletin 1 (Mar. 3, 1976) 18-19

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82 C.J.S., Statutes, § 388 9

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American Indian Policy Review Commission, Final Report, May 17, 1977, Vol. 1, p. 356 14

American Indian Policy Review Commission, Final Report, May 17, 1977, Vol. I, p. 357 23-24

American Indian Policy Review Commission, Final Report, May 17, 1977, Vol. I, p. 358 24-25

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Indian Appropriation Act, April 30, 1908 (35 Stat. 71) 17-18

Report of the Secretary of Interior for the Fiscal Year Ended June 30, 1909, p. 26 13

Report of the Secretary of Interior for the Fiscal Year Ended June 30, 1910, p. 39 13

Report of the Secretary of Interior for the Fiscal Year Ended June 30, 1912, p. 60 13

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OPINIONS BELOW

The citations to the opinions in the United States Court of Appeals and the District Court contained in the Petition for Writ of Certiorari are accurate.

JURISDICTION

The statement of jurisdiction contained in the Petition is accurate.

QUESTION PRESENTED

The question presented is accurately and succinctly stated in the Petition.

STATUTORY PROVISIONS INVOLVED

The Petition accurately and adequately sets forth the statutory provisions involved.

THE PARTIES

The Petitioners will hereinafter be referred to as BIA, the Government, or Petitioners. Glover Construction Company will herein be referred to as Respondent.

STATEMENT OF THE CASE

In March of 1976 the BIA, by and through the Commissioner of Indian Affairs, issued a memorandum interpreting 25 U.S.C. § 47, recently known as the Buy Indian Act. 25 U.S.C. § 47 was originally a priviso to a statute passed in 1910. Under the 1976 interpretive memorandum, bidding on contracts with the BIA is restricted to Indian-owned companies. Non-Indian companies are permitted to bid only if Indian companies are not available.

On March 25, 1977, a contract for the construction of five miles roadway in Pushmataha County, Oklahoma, was awarded to Indian Nations Construction Company.[1] Re-

[1] In this connection the Government, in Footnote 5 of its brief states that we have misstated the evidence in our brief in opposition to certiorari, with regard to the involvement of a non-Indian, Hubert Day, in this corporation, and with regard to whether Indians are working on the Hanobia Road project. The Government is wrong. Exhibit A to the Government's motion for summary judgment in the District Court states clearly and unequivocally that Hubert A. Day is Treasurer and General Manager of Indian Nations, as well as being one of the original incorporators. The Government's suggestion that he is just job

spondent requested the opportunity to bid on the project, but was not permitted to bid because Respondent's company is not Indian owned. The contract price was $1,219,-481.00. The engineer's estimate was $963,117.48. The first five miles of the roadway was built by Respondent, under normal bidding procedures, at a price of $538,000.00.

Respondent filed suit in the district court, asserting that the agency's interpretation of 25 U.S.C. § 47 was arbitrary, capricious, and unreasonable, and that the same was in violation of 41 U.S.C. § 253. Respondent further asserted that the contract with Indian Nations was void for the same reasons the agency's interpretation of the statute was invalid. Both parties filed motions for summary judgment.

1 (Continued)
superintendent is a misstatement of the facts. The Government also asserts that we have misstated the facts about Indian workers, citing the Wing deposition and the Donahoe deposition. At pages 26 and 27 of the Donahoe deposition, the following exchange is reported:

"Q. Have you ever made an inspection or asked an inspection to be made to find out how many Indians were being used on the job that we are talking about, the Hanobia Road job?

A. *No.*" (emphasis added)

At pages 21 and 22 respectively of the Wing deposition, the following exchanges are reported:

"Q. Has the government made any effort to ascertain the number of Indians who are actually employed doing work on this job?

"A. I do not know, I do not think so.

Q. But you don't know whether there is an Indian out there working or not do you?

A. I know that there are at least, I think two (2) but again I have not checked personally to see if there [*sic*] Indians, I can only say that I have seen a couple of the workers who appear to me to be Indians."

41 U.S.C. § 252(c) makes all purchases and contracts for property and services subject to the advertising requirements of Section 253 of that title, unless the contract comes within one of the fifteen enumerated exceptions of Section 252(c). Subsection (e)(B) of Section 252 specifically provides that Section 252 shall not be construed to permit any contract for the construction of roads to be negotiated without advertising as required by Section 253, unless, the contract is to be performed outside the Continental United States or unless negotiation is authorized by paragraphs (1)-(3), (10)-(12), or (14) of subsection (c) of Section 252.

In the district court, the Government asserted that the negotiation of roadway contracts by the Bureau of Indian Affairs was permitted under the "otherwise authorized by law" exception stated in paragraph 15 of Section 252(c). In support thereof, the Government argued that Section 252(e) was merely an admonition and not a prohibition. Also, they urged that 25 U.S.C. § 47 has been administratively interpreted for many years to allow construction contracts to be restricted to only Indian contractors.

The district court rejected the argument that 252(e) was merely an admonition (Pet. for Cert., App. D, 40a). The court noted that Congress specifically exempted seven subsections of Section 252(c) with respect to road construction, but did not include the "otherwise authorized by law" provision of subsection (c)(15) (Pet. for Cert., App. D, 40a).

The court went on to find that the rule of deference to an administrative interpretation did not apply to this case

because the statute was enacted in 1910 and the complained of interpretation, set forth in the 1976 bulletin, may date back as far as 1961 (Pet. for Cert., App. D, 46a).

The court's judgment declared the complained of contract null and void and permanently enjoined the Petitioners from "circumventing the advertising requirements of 41 U.S.C. § 253 in connection with future roadway construction contracts."

Thereafter, the Government appealed to the Tenth Circuit Court of Appeals. The above mentioned arguments were again asserted by the Government and were rejected by the appellate court. In addition thereto, the Government argued that the district court had erroneously concluded that the Federal Property and Administrative Services Act impliedly repealed 25 U.S.C. § 47 and that negotiated roadway contracts should be permitted under a liberal interpretation of 25 U.S.C. § 47, in order to accomplish the remedial purposes of the Act.

The court found no conflict, and thus no implied repeal, in 41 U.S.C. § 252 and § 253 and 25 U.S.C. § 47. The court simply declined to accept the position that the purchase of "Indian supplies" and "products" on the "open market" related to roadway construction contracts (Pet. for Cert., App. A, 14a). The court noted that "It is clear, on its face, however, that the Congress did intend that U.S.C.A. § 252 and § 253 apply to road construction projects" (Pet. for Cert., App. A, 15a).

The court acknowledged that 25 U.S.C. § 47 is a remedial act and is to be given a liberal interpretation. However, the court noted: "Even so, we believe it strains the

most liberal construction to conclude the act's preference for purchase of 'Indian supplies' and 'products' applies to a roadway construction project whose contract price, through Indian construction, is $1,219,481.00" (Pet. for Cert., App. A, 19a).

The decision of the district court was AFFIRMED.

SUMMARY OF ARGUMENT

I.

25 U.S.C. § 47 was originally a proviso to Section 23 of the Act of June 25, 1910. Section 23 was enacted to require the Indian Service to use competitive bidding in the purchase of its supplies. As such, Section 23 was a remedial statute and should be liberally construed to encourage competitive bidding.' 47 U.S.C. § 25, being the proviso to that section, should be construed in light of the enacting clause of Section 23, and the purposes to be achieved by Section 23. According to general principles of statutory construction, the proviso, 25 U.S.C. § 47, should be strictly construed.

II.

25 U.S.C. § 47 was passed in 1910. At the very earliest, the BIA began interpreting the statute to relieve it from competitive bidding requirements on roadway construction in 1961. The interpretive bulletin which was challenged in the district court by the Respondent is dated March 3, 1976. It is a generally accepted proposition that a contemporaneous administrative interpretation of the statute by an administrative department is entitled to great weight,

but that an administrative interpretation several years after an enactment is entitled to no weight.

III.

The mere fact that 25 U.S.C. § 47 applies to Indians does not require this Court to blindly rubberstamp the interpretation of the statute urged by the Government. The general rule suggesting a liberal interpretation of the statutes relating to Indians does not require the Court to disregard the intent of the Legislature in enacting the statute. This is particularly true, where, as in this case, the Government's interpretation does not benefit the Indian community, and may, in fact, be detrimental to the Indian Community in general.

IV.

Roadway construction contracts with the BIA were regulated by 41 U.S.C. § 5, until 41 U.S.C. § 252 and § 253 were made applicable to the BIA. Both statutes make such contracts subject to the competitive bidding requirements of the law. 25 U.S.C. § 47 only relates to Indian supplies and products of Indian industry. Five miles of roadway construction, costing $1.2 million dollars does not fall into the category of being Indian supplies or products.

ARGUMENT

I.

ROAD CONSTRUCTION PROJECTS ARE NOT SUPPLIES OR PRODUCTS AVAILABLE IN THE OPEN MARKET WITHIN THE MEANING OF 25 U.S.C. § 47.

The ultimate issue before this Court is the question of whether 25 U.S.C. § 47 permits the BIA to let roadway construction contracts to Indian-owned corporations without advertising or competitive bidding.

In order to resolve the above stated issue, the statute itself, and the circumstances surrounding its enactment must be carefully considered.

25 U.S.C. § 47 provides:

> "So far as may be practicable Indian labor shall be employed and purchases of the products of Indian industry may be made in the open market in the discretion of the Secretary of the Interior."

Section 47 was codified from the Act of June 25, 1910, ch. 431, § 23, 36 Stat. 861, which provides in its entirety, as follows:

> "That thereafter the purchase of Indian supplies shall be made in conformity with the requirements of section thirty seven hundred and nine of the Revised statutes of the United States: Provided, that so far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in the open market in the discretion of the Secretary of the Interior. All acts and parts of acts in conflict with the provision of this section are hereby repealed."

Section 3709, now codified as 41 U.S.C. § 5, required advertisement before purchases were made by Government agencies.

Section 23 of the Act of June 25, 1910 was a remedial statute. This fact has been emphasized in the lower courts and is heavily relied upon by the Government. The legal principles concerning construction of remedial statutes are well settled. The Court's attention is respectfully invited to 82 C.J.S., *Statutes,* § 388, which provides as follows:

> "In construing remedial statutes, regard should be had to the former law, the defects to be cured or abolished, or the mischief to be remedied, and the remedy provided, and, they should be interpreted liberally to embrace all cases within their scope, so as to accomplish the object of the legislature, and to effectuate the purpose of the statute by suppressing the mischiefs and advancing the remedy, provided it can be done by reasonable construction in furtherance of the object."

In the case of *Stewart* v. *Kahn,* 11 Wall. 493, 20 L.Ed. 176 (1871), at page 504 this Court stated:

> "The statute is a remedial one and should be construed liberally to carry out the wise and salutary purposes of its enactment. . . . Considering the evils which existed, the remedy prescribed, the object to be accomplished, and the considerations by which the law makers were governed — lights which every court must hold up for its guidance when seeking the meaning of a statute which requires construction — . . ."

Since Section 23 (25 U.S.C. § 47) was a remedial statute, certain critical questions concerning why it was enacted must be asked. What evil did Congress want abol-

ished? What defect needed to be cured? What mischief did Congress want to suppress?

Judge McKay's dissenting opinion (Pet. for Cert., App. 23a), identifies exactly the purpose Congress desired to achieve:

> "Prior to the passage of the amendment, the House Committee on Indian Affairs commented on its purpose and compared it to the version being amended:
>
> > The purpose of this section is patent from the text. If this section shall be enacted into law it will repeal the following portion of the act of April 30, 1908 (35 Stat., 71):[2]

Clearly the defect Congress desired to correct was the Indian Appropriation Act, April 30, 1908 (35 Stat. 71).

The reasons why the above mentioned Act was repealed are stated in unequivocal terms by Rep. Burke, 45 Cong. Rec. 6097 (1910). The Government has quoted por-

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[2] That no purchase of supplies for which appropriations are herein or hereinafter made for the Indian service, exceeding in the aggregate five hundred dollars in value at any one time, shall be made without first giving at least three weeks' public notice by advertisement, except in case of exigency, when, in the discretion of the Secretary of the Interior, who shall make official record of the facts constituting the exigency, and shall report the same to Congress at its next session, he may direct that purchases may be made in open market in amount not exceeding three thousand dollars at any one purchase: *Provided,* That hereafter supplies may be purchased, contracts let, and labor employed for the construction of artesian wells, ditches, and other works for irrigation, not to exceed the sum of five thousand dollars in any one purchase or contract, in the discretion of the Secretary of the Interior, without advertising as hereinbefore provided: *Provided further,* That as far as practicable Indian labor shall be employed and purchase in the open market made from Indians, under the direction of the Secretary of the Interior." [Indian Appropriation Act, April 30, 1908 (35 Stat. 71)]

tions of Rep. Burke's remarks at pages 14, 25, 26 and 35 of their brief. We believe his remarks, in their entirety, are worthy of this Court's consideration:

> "Mr. Burke of South Dakota. The law which it is proposed to repeal is not only unnecessary but wholly indefensible. Until within recent years it has been subject to abuse in administration. Under it there is practically no limitation on the amount of purchases of supplies that may be made without advertising. The law has been construed — erroneously, as I believe — to exempt purchases in amounts not to exceed $500 at any one time from advertising in any form or manner. Therefore purchases not to exceed $500 in value may be legally multiplied indefinitely.
>
> "The ostensible limitation on exigency purchases not to exceed $3,000 at any one purchase is in legal effect no limitation at all, as purchases of that amount may be multiplied at the pleasure of the department. During the administration of the Interior Department by Secretary Garfield regulations were promulgated to correct the abuse which had grown up under the law and permitted by it, and purchases of Indian supplies were required to be made in conformity with the law applicable to all other branches of the public service embodied in section 3709, Revised Statutes. The existing law, which in the absence of regulations nullifying it, permits abuses of the nature described and which have been and may again be practiced with impunity should be repealed. The legislation proposed will give the Indian service all the relief from a strict compliance with the general law (section 3709) that is necessary in the interest of good administration. There is no reason why Indian service contracts for either supplies or irrigation systems should not conform to the law applicable to all other branches of the public service except in so far as the proviso in the proposed

> legislation affects the purchases of products of Indian industry and the employment of Indian labor. The existing law on the subject is capable of great abuse, is wholly unnecessary, and absolutely indefensible."

There can be no doubt but that Congress passed this statute to correct flagrant abuses in purchasing within the Indian Service, and further that Congress prescribed advertising and competitive bidding as the remedy for those abuses.

The suggestion that this statute, which was enacted to compel competitive bidding, would be used to justify the award of a $1.2 million dollar contract without competitive bidding is utterly incomprehensible, and in direct opposition to the remedial purposes of the Act.

It is also significant to note that the Act of April 30, 1908, specifically permitted the Indian services to let construction contracts, somewhat analogous to roadway construction, in amounts less than $5,000, without advertising or competitive bidding. When Section 23 was enacted, that portion of the 1908 Act dealing with construction was entirely omitted. Obviously, Congress knew that the Indian Service was involved in construction contracts, and, likewise, it is obvious that Congress intended that expensive construction projects be subject to competitive bidding. Had Congress desired to exempt certain construction projects from competitive bidding, the construction provisions in the 1908 Act would have been modified instead of being completely deleted.

In *Stewart* v. *Kahn, supra,* at page 502, this Court stated:

> "It is a rule of law that where a revising statute, or one enacted for another, omits provisions contained in the original act, the parts omitted cannot be kept in force by construction, but are annulled."

During the years immediately preceding and after the 1910 legislation, the Secretary of the Interior repeatedly stressed the need for securing more competition and lower prices in the purchase of supplies for the Indian Service. In the *Report of the Secretary of Interior for the Fiscal Year Ended June 30, 1909,* at page 26, it is stated:

> "The Indian Service is purchasing about $2,000,000 worth of supplies each year under a system which is in no wise based on commercial methods, as a result of which there is a lack of competition because Indian business can not be as enticing to manufacturers as commercial business, goods are not being obtained at the best prices, and trade discount is an unknown factor."

In the *Report of the Secretary of Interior for the Fiscal Year Ended June 30, 1910,* at page 39, it is stated in reference to a recommendation to discontinue certain warehouses:

> "I believed that such a change would result in a net saving to the Government in the purchase of Indian supplies by securing wider competition, especially among local business firms. . . ."

In the *Report of the Secretary of Interior for the Fiscal Year Ended June 30, 1912,* at page 60, it is stated with regard to payment of claims:

> "Prompt payment is expected to increase competition and to lower prices."

During the relevant time period surrounding the enactment of 25 U.S.C. § 47, this writer could find nothing in the above mentioned reports[3] or in the other reports cited in the Petitioner's brief concerning preferential purchases from Indian contractors. The purchase of supplies for the Indian Service was extensively discussed, and as above stated, the recurring theme on the subject of supplies was the need for more competition.

That Congress intended the Act in question to jusitfy a negotiated contract for five miles of road construction is rendered even more inplausible when it is remembered that the Federal Government did not even get into the businss of funding roads on Indian reservations until 1935,[4] twenty-five years after the passage of the Act.

That part of Section 23 which the Government at this late date refers to as the "Buy Indian Act" was originally a proviso to the section.

Respondent suggests that the proviso to Section 23 should be interpreted in accordance with general principles of statutory construction.

The proper function of a proviso is to restrict, limit or qualify some portion of the enacting clause of the statute

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[3] Neither the reports above quoted nor the reports quoted in the Government's brief were offered as evidence in the lower court. Other examples of the Government expanding the rcord may be found at page 33 of their brief and Appendix C of their brief. Appendix C is even dated after this Court granted certiorari. Since the Government has seen fit to quote from Government reports not offered in evidence, we have no choice but to follow suit.

[4] American Indian Policy Review Commission, Final Report, submitted to Congress May 17, 1977, Vol. I, page 356.

wherein it is contained. Provisos should be strictly construed.

The foundation case for interpretation of provisos in statutes is *United States* v. *Dickson, et al.*, 15 Pet. 141, 10 L.Ed. 689 (1841). At page 162 this Court stated:

> ". . . we are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof."

This Court's attention is also invited to *Hollander* v. *Magnoe*, 149 U.S. 586, 13 S.Ct. 932, 3 L.Ed. 860 (1893). At page 591 this Court explained:

> *"The natural limitation of a proviso is to those things that have been previously mentioned.* Before the proviso, there are named only wines — sparkling and still; so any word of general description used therein would, in the absence of satisfactory reasons to the contrary, be taken to refer to those articles, to-wit, wines." (Emphasis added)

Based on the foregoing authorities, it is reasonable to suggest that the objects of a proviso are limited to some special variation of the object regulated in the enacting clause, or is a special exception carved out of the object regulated by the enacting clause.

In the instant case, there is no question but that the object regulated in the enacting clause is Indian supplies. No other object is even mentioned in the enacting clause. Applying the above quoted authority to the statute, no other conclusion can be reached but that the scope of "products of Indian industry . . . in the open market" is limited to the purchase of Indian supplies. Simply stated, the type of Indian supplies exempted from competitive bidding, are products of Indian industry.

The Government can reach the conclusion that roadway construction is a "product" only if the enacting clause of the statute is absolutely ignored in interpreting the proviso. This, of course, is exactly what the Government has done. No effort is made by the Government to argue that "Indian supplies" includes roadway construction.

As hereinbefore stated, the statute in question is a remedial statute. This Court made it clear in the case of *Cresent Express Lines* v. *United States*, 320 U.S. 401, 88 L.Ed. 127 (1943), that provisos in remedial statutes are subject to the same rules of construction as other statutes. At page 409 the Court stated:

> "As the act is remedial and to be construed liberally, the proviso defining exemptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms."

Without regard to the remedial purpose of promoting competitive bidding, and without regard to long-standing rules of statutory construction, the language of the Act itself simply does not include roadway construction. Five miles of roadway in Pushmataha County, Oklahoma, is

simply not "Indian supplies", nor is it a "product" for sale on the "open market."

In the case of *Sanborn* v. *Commissioner of Internal Revenue*, 88 F.2d 137 (8th Cir. 1937), *cert. den.* 301 U.S. 700, the Court stated:

> "The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of the hard case and the ingenuity and study of an acute and powerful intellect would discover."

In 1910 the plain, obvious and rational meaning of Indian supplies and products for sale on the open market would probably have included foodstuffs, blankets, bolts of cloth and other similar commodities. In 1980, it might include electronic calculators, typewriters, computers, or anything else for sale in the market place. Freeways, public buildings, and roads are not products and are not for sale in the open market.

Had Congress intended that the proviso in the statute apply to roadway construction, it is more than just improbable that curious language like "products of Indian industry . . . in the open market" would have been selected to demonstrate that intent. The 1908 version of this Act had standard construction project language in it. Congress had to be aware of this language since their avowed purpose in passing this Act, was to repeal the 1908 Act. In the 1908 version of the Act, when Congress desired to exempt from competitive bidding construction of artesian wells, ditches, and irrigation works up to $5,000.00, the language used was ". . . Construction of artesian wells,

ditches, and works of irrigation. . . ." *Indian Appropriation Act*, April 30, 1908 (35 Stat. 71).

Respondent is aware that this Court has cautioned against undue reliance upon rules of statutory construction. *United States* v. *Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221, 73 S.Ct. 227, 97 L.Ed. 260 (1952). However, Respondent suggests that, when the legislative history is "rather scanty" in the words of Judge McKay (Pet. for Cert., App. 22a) and "somewhat sparse" according to the Government (Brief of Pet. 25), the rules of statutory construction must be given added significance. This is particularly true where the application of the rules, the legislative history, and the language of the Act all lead to the same interpretation. In this case, all three tests for legislative intent suggest that roadway construction is not a product of Indian industry in the open market.

II.

THE BIA'S RECENT ADMINISTRATIVE CONSTRUCTION THAT ROADWAY CONSTRUCTION IS EXEMPT FROM COMPETITIVE BIDDING IS ENTITLED TO NO WEIGHT.

Whether the administrative interpretations that roadway construction contracts with Indian-owned companies is exempt from competitive bidding is entitled to any weight depends upon the history of that interpretation. The evidence is disputed as to when the BIA first commenced interpreting Section 47 to include roadway projects. 20 BIAM Bulletin 1 is dated March 3, 1976 (Brief of Pet. App. 7a). The last paragraph of the Bulletin is particularly interesting on the point. It states:

> "Regulations implementing the Buy Indian Act are being prepared and should be issued within the next few months."

Respondent suggests that 67 years is a long time to wait for the preparation and issuance of implementing regulations. The Solicitor's opinion authorizing the complained of interpretation is dated 1971 (Pet. for Cert., App. 59a). The opinion itself states the practice had been in existence for ten years at that time. Whether the complained of interpretation commenced in 1976, 1971 or 1961 is probably immaterial. In any event, it did not exist prior to 1961. The Statute itself was enacted in 1910. For fifty-one years, viewing the evidence in the light most favorable to the BIA, neither the BIA nor anyone else interpreted 25 U.S.C. § 47 as encompassing roadway construction projects. Clearly, if the intent of Congress in 1910 had been to restrict roadway construction projects to Indian-owned corporations, and to not even permit non-Indian companies the right to submit a bid, somebody would have discovered that intention before fifty-one years had elapsed. The cases are legion that stand for the proposition that a contemporaneous administrative interpretation of a statute by an administrative department is entitled to great weight, but that an administrative interpretation several years after enactment is entitled to no weight. *See, United States* v. *Missouri Pacific R.R.*, 278 U.S. 269, 280 (1929); *Udal* v. *Tallman*, 380 U.S. 1 (1965); *United States* v. *Manzi*, 16 F.2d 884 (1st Cir. 1926).

Citizens Band of Pottawatomie Indians of Oklahoma v. *United States*, 391 F.2d 614 (Ct. Cl. 1967), *cert. den.* 389 U.S. 1048 (1968), is a case involving an attempt by an administrative agency to change its interpretation of a leg-

islative enactment many years after the passage of the act. This case involved the interpretation of a treaty entered into between the United States Government and the United Tribes of Ottawas, Chippewas, and Pottawatomies. The dispute arose over whether the United States in a treaty of August 24, 1816, reserved certain lead deposits from lands ceded to the above named Indian Tribes. The Indian Claims Commission determined from a subsequent treaty in 1929 between the United States and the same tribes that the lead deposits in question were reserved to the United States in the 1816 treaty.

The court looked to the records and correspondence of the government agency following the 1816 treaty, and therefrom determined that the Government had acknowledged that the Indians had retained the lead deposits under the Government's interpretation of the treaty shortly after the treaty had been approved. The court then ruled the interpretation nearer in time to the enactment prevailed over a later interpretation.

In reversing the Indian Claims Commission, the Court reasoned as follows:

> "Certainly, where administrative practice has been consistent and generally unchallenged, such 'practice has peculiar weight when it involves a contemporaneous construction of a statute by the man charged with the responsibility of setting its machinery in motion (and) making the parts work efficiently and smoothly * * *' (Citation omitted). And, where such practice is disputed in later years, more weight should be given to the interpretation made closer in time to the making of the law to be construed."

In short, the Respondent submits to the Court that the foregoing cases and authorities stand for the proposition that neither the BIA nor any other agency of government can circumvent the function of Congress by virtually enacting a new law through simply giving a new or different interpretation to an old statute. This principle was very succinctly pointed out in the case of *Bowers* v. *West Virginia Pulp & P. Co.*, 297 Fed. 225 (2d Cir. 1924), wherein the Court, in a per curiam opinion stated:

> "Changes in treasury decisions do not change the law, but merely announce a change in opinion about the law of some official."

The Government takes the position that the reports of the Secretary of Interior and Commissioner of Indian Affairs, which were contemporaneous with the passage of the Act, support their present-day interpretation of the Act (Brief of Pet. 27, 28, 29, and 30). That simply is not the case. The reports do indeed speak repeatedly in terms of employment of Indians, but they say nothing about exempting construction projects from competitive bidding.

Respondent has argued at every stage of this proceeding, commencing with its motion for summary judgment in the district court, that Indian labor should be given a preference in BIA projects. Respondent also suggests that both the complained of interpretative bulletin and the application of the bulletin ignores the question of employment of Indian workmen.[5]

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[5] See depositions of Wing and Donahoe at Footnote 1.

Finally, Respondent suggests that the racial heritage of the stockholders of a corporation is entirely immaterial to the racial heritage of the workmen employed by the Corporation. There is no reason why the BIA cannot require an affirmative action plan or other similar device to assure the employment of Indian workmen on BIA projects.

III.

THE SPECIAL RELATIONSHIP BETWEEN THE FEDERAL GOVERNMENT AND THE INDIANS DOES NOT COMPEL A STRAINED INTERPRETATION OF 25 U.S.C. § 47.

Respondent is aware that this Court is committed to the rule that doubtful expressions are to be resolved in favor of the Indians. *McClanahan* v. *Arizona Tax Commission,* 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). There are, however, certain limitations upon the application of the above mentioned rule. In *DeCoteau* v. *District County Court,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975), this Court declined to rewrite a 1891 statute in furtherance of a liberal construction. At page 447, this Court observed:

> "We give this rule the broadest possible scope, but it remains at base a cannon for construing complex treaties, statute, and contracts which define the status of Indian tribes. *A cannon of construction is not a license to disregard clear expressions of tribal and congressional intent.*" (Emphasis added)

In order to categorize roadway construction as a product of Indian industry in the open market, it would be necessary to rewrite the statute to include the construction

language of the 1908 version of the Act which Congress clearly and intentionally deleted from the Act of June 25, 1910.

In *Oliphant* v. *Suquamash Indian Tribe,* 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), at footnote number 17, this Court indicated that surrounding circumstances and legislative history outweigh the rule of liberal construction.

As has been heretofore shown, the statute in question was a competitive bidding law designed to eliminate abuses and encourage competition in the purchase of Indian supplies. The history and circumstances of the Act show that it was completely disconnected with construction projects of any type.

Respondent would further respectfully suggest that just because the Government says that exemption of roadway construction from competitive bidding would benefit the Indians, does not necessarily make that statement a fact. As has been heretofore shown, the complained of Bulletin and the application of the Bulletin on the project in question, does not create jobs for Indian workmen.

The Court's attention is respectfully invited to the *American Indian Policy Review Commission, Final Report,* submitted to Congress May 17, 1977, Volume I at page 357, it is stated:

> *"Road Maintenance*
>
> "Maintenance on roads under BIA's jurisdiction has been estimated by its Division of Transportation to be about 40 percent adequate. In the hearings for 1976 appropriations it was estimated that the BIA's road

system was deteriorating at the rate of about $40 million a year. For the same period BIA was obligating about $9 million a year for maintenance. A considerable portion of the road construction budget is admitted to go for the reconstruction and upgrading of prematurely deteriorated roads."

At page 358 of the same report, the following appears:

"Needs and Adequacy of Roads

"Assessments of overall road needs on reservations until recently have been based on several types of comparisons. Comparisons made of road mileage per area and population for reservations and Non-Indian areas were made. Comparisons made of reservations with surrounding nonreservation counties have been the most reasonable. They have consistently shown Indian road networks to be about one-half the density of non-Indian networks.

"The existing provision of road construction and maintenance by the BIA combined with the roads provided by surrounding States and counties is *clearly inadequate*. The BIA's estimates suggest that one-half of the $80 million requested for construction and maintenance in 1977 is required to simply maintain the status quo. The remaining $40 million for upgrading and expanding the system is clearly inadequate compared to the FHWA Study. *It is obvious that the existing system cannot be improved let alone expanded under the current budget levels.*

"Inadequate transportation systems are a hindrance to development. Reservation transportation networks should be related to tribal development plans as well as to social and education needs. In the long run, however, the level, type, and distribution of economic activities will significantly determine the extent to

which roads remain usable and safe. There is clearly a need, legal basis, and strong precedent for greater Federal support in road construction and maintenance." (Emphasis added)

Bearing in mind that the first five miles of the Hanobia Road was built by Respondent at $538,000.00, under competitive bidding, and the second five miles, without competitive bidding, costs $1.2 million dollars, while the engineer's estimate of the cost was only $963,117.48, it is not unfair to suggest that the Indian community as a whole would greatly benefit from competitive bidding on roadway construction projects.

IV.

41 U.S.C. SECTION 5 AND 41 U.S.C. SECTIONS 252 AND 253 REQUIRE THE BIA TO ADVERTISE AND OBTAIN COMPETITIVE BIDS ON ROADWAY CONSTRUCTION PROJECTS.

Respondent has no significant dispute with much of what the Government states in Part II, Subsection A of their brief (Brief of Pet. 33-38).

As Respondent understands Part II, subsection A, the Government takes the position that before the passage of 41 U.S.C. § 252 and § 253, the BIA and its predecessor, the Indian Service, were regulated by Section 3709 or 41 U.S.C. § 5. Insofar as the purchase of "Indian supplies" were concerned the Secretary, when practicable, could show a preference for the products of Industry now in the "open market." Respondent, of course, does vigorously dispute the Government's contention that roadway construction falls within the purview of Indian supplies and products of In-

dian industry available on the open market. Respondent has hereinbefore stated its position on that issue.

In short, it is sufficient to say that, since 25 U.S.C. § 47 does not cover roadway construction, Section 3709 (41 U.S.C. § 5) required that roadway construction contracts be based on advertising and competitive bidding.

Just as 41 U.S.C. § 5 required the BIA to advertise and obtain bids on roadway construction contracts, when 41 U.S.C. § 252 and § 253 became applicable to the BIA, the competitive bidding requirements continued.

Section 252(c) makes all purchases and contracts for property and services subject to the advertising requirements of Section 253, unless they come within the fifteen enumerated exceptions of Section 252. The relevant portions of 41 U.S.C. § 252 are as follows:

> *"41 U.S.C., Sec. 252 — Negotiated purchases and contract for property: conditions.*
>
> (c) All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if - - -
>
> (15) otherwise authorized by law.
> *Exceptions to this section:*
>
> (e) *This section shall not be construed to:* . . . (B) permit any contract for the construction or repair of buildings, *roads,* sidewalks, sewers, mains, or similar items to be negotiated without advertising as required by Section 253 of this title, unless such contract is to be performed outside the continental United States or unless negotiation of such contract is authorized by the provisions of paragraphs (1)-(3), (10)-(12), or (14) of subsection (c) of this title." (Emphasis added)

Respondent is led to believe that the Government concedes that the above quoted statute applies to the BIA. That the statute applies to roadway construction is inescapable from language of the Act. Section 253 requires competitive bidding. It is therefore apparent that the roadway project in question is subject to competitive bidding, unless the project is somehow excepted from the application of the statute. The Government's position in the 1971 Solicitor's opinion, in the district court, and in the circuit court, was that the project in question fell within the "otherwise authorized by law" provisions of subsection (c), and that subsection (e)(B) was merely an admontion and not a prohibition. Their theory was that the project was otherwise authorized by law because it was negotiated pursuant to 25 U.S.C. § 47.

Now, at this stage of the proceedings, the Government has modified its position. Apparently, it now asserts that the BIA in no way looks to Section 252(c)(15) for authorization to dispense with competitive bidding on roadway projects. That the source of such authorization is entirely 25 U.S.C. § 47, and since Section 252(c)(15) is not necessary for authorization, Section 252(e)(B) has no application.

We agree with the Government that subsection (e) is limited in scope to the matters covered in subsection (c), but subsection (c) clearly applies to "all purchases and contracts for property and services", except the 15 enumerated exceptions. If, as the Government now contends, the project in question does not fall into any of the above mentioned enumerated exceptions to subsection (c), then

clearly the general requirements of both subsection (c) and (e) apply. The Government's theory would make subsection (e) only applicable to the exceptions to subsection (c). We believe it applies to the enacting clause as well as the exceptions.

The issue is largely academic, because in order to escape the requirements of Sections 252 and 253, whatever the proper interpretation of them may be, 25 U.S.C. § 47 must be construed to apply to roadway construction contracts. As has been heretofore shown, roadway construction does not fall into the category of Indian supplies or products in the open market, and, therefore, the requirements of Sections 252 and 253 must be complied with on roadway construction.

In this connection, the Government erroneously asserts that the lower courts must have concluded that 41 U.S.C. § 252(e) impliedly repealed 25 U.S.C. § 47. They then cite *Morton* v. *Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), for the proposition that repeals by implication are not favored. The Government has completely missed the point. The lower courts simply concluded that 25 U.S.C. § 47 did not apply to roadway construction projects. This conclusion is further supported by the expression of Congressional intent concerning the passage of 41 U.S.C. § 252 in 1949 by the following statement found in *House Report* No. 670, May 24, 1949, 81st Cong., 1st Sess., 1949 U.S. Code Cong. and Adm. News, 1457, 1498, wherein it stated:

> "(e) For clarity this subsection provides that Section 302, 41 U.S.C. 252, does not authorize or change the existing requirements for authorization for the erection or repair of buildings, roads, sidewalks, or similar items."

It is significant to remember that the evidence shows the Government only began to interpret 25 U.S.C. § 47 to relieve the BIA of competitive bidding requirements on roadway projects in 1961, at the very earliest.

CONCLUSION

The judgment of the Tenth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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